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In The

Supreme Court of the United States

October Term, 1970

No.

Michael Benjamin Weisman,
Petitioner,

v.

United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Michael Benjamin Weisman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned case on September 25, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, dated September 25, 1970, is unreported and is reprinted herein as Appendix A.

JURISDICTION

The opinion of the Eighth Circuit was rendered on September 25, 1970. On October 9, 1970, petitioner filed a timely petition for rehearing in the Eighth Circuit, and the petition was denied on October 22, 1970. On November 12, 1970, petitioner filed in this Court an application for an extension of time within which to file a petition for a writ of certiorari. Mr. Justice Blackmun, on November 13, 1970, issued an order extending time within which to file the petition to and including December 21, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the circumstances of the alleged offense and the prosecution, conviction and sentencing of petitioner for knowingly mutilating his draft card—including the admission that he was singled out because of the public nature of his act—demonstrate that petitioner is being punished unjustly because of a public expression of opposition to the war in Vietnam, in violation of the First Amendment.

2. Whether one who tears his draft card into two pieces and immediately delivers both to a police officer believing him to be an FBI Agent knowingly mutilates or destroys such certificate in violation of 50 App.U.S.C. § 462(b)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 462(b)(3) of 50 App. U.S.C. [illegible] set forth in Appendix B.

STATEMENT OF THE CASE

Petitioner was indicted and convicted of violating § 462(b)(3) of the Universal Military Training and Service Act, 70 Stat. 886 (1956), 50 App. U.S.C. § 462 (b)(3) (1958), for publicly tearing into two pieces his Selective Service Registration Certificate.

The facts are these:

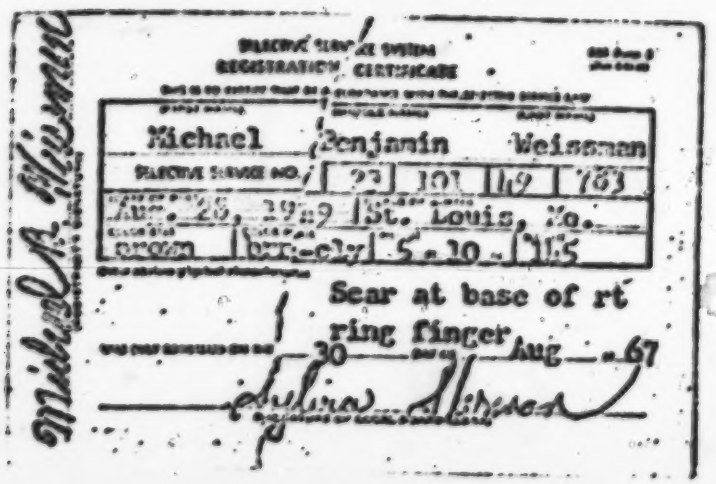
Petitioner registered as required by law with his Local Selective Service Board in a suburb of St. Louis, Missouri. He was given a II-S student deferment classification. He received and carried his Registration Certificate (SS Form No. 2) and Notice of Classification (SS Form No. 110).

On August 30, 1968, petitioner, then a nineteen year old Harvard undergraduate, was one of a hundred people demonstrating in front of the St. Louis City Hall. They marched in an orderly and peaceful fashion, carrying placards condemning the conduct of the Chicago police—this was the summer of 1968—and the war in Vietnam. At one point in the demonstration the participants were called to attention by a demonstration leader, and a few announcements were made. Then the petitioner stepped forward and, as he testified, ". . . said something like, 'I am going to destroy my independence from the Selective Service System'." (Tr. 26; see also Tr. 29. "Tr." indicates a transcript reference to the Court of Appeals Appendix.) At the end of his statement the petitioner tore his Registration Certificate and Notice of Classification in two parts and handed them to a man whom he thought to be an FBI Agent, but who actually was a plain clothes member of the St. Louis police. When the two parts of the torn cards are placed together the cards

are completely readable." (Tr. 14; see also the card reproduced below and Appendix C).

On the day following, the petitioner, "with the greatest sadness and confusion that I have ever felt . . .," wrote a letter to his local draft board requesting duplicate cards.[1]

> As was reported on the news media, I ripped my cards in half and gave them to a plain-clothes policeman. As I stated at that time, I expected the support of my family and had no intention of requesting duplicate cards. I was shocked to discover that my family was made totally miserable and that they spent the next day weeping and accusing me of hurting them. I don't believe in inflicting that kind of suffering for uncertain and hypothetical results.
>
> • • • •


REGISTRATION CERTIFICATE
Michael Benjamin Weissman
SELECTIVE SERVICE NO. 22 101 09 783
Aug. 26, 1949 St. Louis, Mo.
brown brown 5 - 10 165
Scar at base of rt ring finger
30 Aug 67
Michael A. Weissman

[1] Although petitioner's letter to his draft board is dated September 1, 1968, two days after the alleged offence, petitioner testified that he mailed the letter "The next morning" (Tr. 37). The opinion of the Court of Appeals mistakenly reports the date of the alleged offense to be April 30, 1968, and the letter, according to the erroneous chronology of the Court of Appeals, would have been mailed four months after the tearing of the cards. (*Infra* at A1).

In response to this letter, the petitioner's draft board sent him a printed form entitled "Request for Duplicate Registration Certificate or Notice of Classification" on which petitioner indicated, by checking an appropriate box, that both his Registration Certificate and Notice of Classification were "destroyed". Duplicate cards were issued and mailed to the petitioner on September 11, 1968, thus restoring the status quo.

On October 23, 1968, petitioner's Local Board reclassified him I-A, and a week later sent him a Notice of Delinquency. These steps appear to have been taken pursuant to Local Board Memorandum No. 85, issued by the National Headquarters of the Selective Service System to all Local Boards, which required Local Boards either to classify as delinquent and accelerate the induction of a registrant who mutilated his draft card, "or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution."

Despite the fact that the Local Board had chosen the delinquency alternative, petitioner was indicted on November 19, 1968, upon the charge that he "willfully and knowingly did mutilate [and] destroy" his Selective Service Registration Certificate. The District Court, sitting without a jury, rendered a judgment of conviction and sentenced petitioner to imprisonment for the maximum period of five years, subject to modification after a three-month study in accordance with 18 U.S.C. § 4208(b) and (c). Petitioner was further sentenced to pay the maximum fine of $10,000.

The Court of Appeals for the Eighth Circuit affirmed. The opinion is reprinted herein as Appendix A.

REASONS FOR GRANTING THE WRIT

I

This Court can exercise no more important function today than to use its appellate power to ensure that young men subject to military conscription are not made to suf-

for destructive punishment under the criminal provisions of the Selective Service laws because of public expression of protest against war and the foreign and military policy of the United States.

We do not question the basic constitutionality of the Act of Congress making one who "knowingly destroys, [or] knowingly mutilates" a Selective Service Registration Certificate guilty of a criminal offense. As this Court held in *United States* v. *O'Brien*, 391 U.S. 367 (1968), such mutilation or destruction is conduct going beyond expression, which Congress may punish where it substantially impairs the government's interest in the smooth operation of the Selective Service System. The fact remains that for many young men public manifestations of scorn centered upon Selective Service Registration Certificates and like papers is an important means of expressing the depth and sincerity of their protest and of calling for political support. When such conduct violates the statute and impairs a substantial governmental interest, the protesters are subject to appropriate punishment, even though the act had elements of public expression. We fully accept these propositions. But when freedom of expression is invoked, the general validity of the statute does not relieve the Court from the duty of determining whether the statute is being applied in a particular case to suppress expression without advancing countervailing interests. *Dennis* v. *United States*, 341 U.S. 494, 513 (1951); see also *Street* v. *New York*, 394 U.S. 576, 578 (1969). It destroys confidence in the integrity of the system to allow a statute to be used to punish public expression of protest where there has been no significant impairment of any governmental interest.

This is such a case.

1. In the aftermath of the Chicago convention of August, 1968, petitioner's gesture was—both subjectively and objectively—the most effective expression of protest

a young man could make against the cruelty of war and what he regarded as the brutality of the police and the evil of the United States policy in Vietnam. Nothing in *United States* v. *O'Brien*, *supra*, denies this simple truth. Nothing in the folly of his beliefs—if it was folly—denies the right of expression.

2. Petitioner's gesture, even though "conduct" as well as expression, could not possibly have had more than a *de minimus* effect upon the governmental interests legitimately secured by § 462(b)(3). Petitioner did not "destroy" his Registration Certificate or "mutilate" it in any natural, common sense view of the words. We submit that tearing the card in half and giving the pieces to an officer who would preserve them does not violate § 462(b)(3) (see pp. 12-13 *infra*). Even assuming, *arguendo*, that such an act was prohibited by the statute, the violation was surely of the most technical character. In *O'Brien*, this Court held that the gravamen of the offense, in light of the governmental interest that Congress constitutionally could protect by enacting the law, is ". . . the deliberate rendering of certificates unavailable for the various purposes which they may serve." [391 U.S. at 280.] Petitioner's certificate, torn into only two pieces, was still identifiable, legible, and usable for every purpose. Had petitioner put the halves back into his wallet, they would have served as well as the untorn card. (See reproduction of two halves of card, *supra* at p. 4.) Had petitioner torn the card in half in his bedroom in a black mood of depression and later notified his Local Board, no one would have suggested a prosecution for violation of § 462(b)(3).

The inference is inescapable, we submit, that the essence of petitioner's "crime" was tearing the card in half in front of a rally at the St. Louis City Hall. Indeed, the government admitted at oral argument before the Eighth Circuit that had petitioner torn his card in the privacy of his home he would not have been prosecuted.

It was the public nature of petitioner's act and not the interruption of the functioning of the Selective Service System, the government stated, that was the reason for the institution of proceedings against him.

3. The absence of injury to any legitimate interests served by § 462(b)(3) is also shown by subsequent events. Petitioner gave the cards to a St. Louis police detective believing him to be an FBI Agent. The next day—not four months later as the Court of Appeals mistakenly supposed (see *supra* note 1)—moved by concern for his parents' suffering, petitioner wrote his Local Board requesting a new Registration Certificate and Notice of Classification. From the standpoint of the operation of the Selective Service System, the situation immediately became the same as it would have been if petitioner had turned in his certificate on one day and asked the Local Board to return it on the next. Petitioner may have violated the regulations requiring him to have the cards in his possession—an offense with which he was not charged[2]—but his gesture had at worst only a *de minimus* effect on any governmental interest served by § 462(b)(3) and recognized in *O'Brien*.

4. Petitioner's delinquency under the Selective Service regulations was corrected and the status quo was fully restored when the Local Selective Service Board sent petitioner a new Registration Certificate and Notice of Classification seventeen days after the original ones were

---

[2] The turning in of draft cards to the Selective Service System or other public officials was, by agreement between the Justice Department and the Selective Service System, not criminally prosecuted, although such action is an offense under 50 App. U.S.C. § 462(b)(6) (HERSHEY, LEGAL ASPECTS OF SELECTIVE SERVICE 47 (1969)). Registrants who turned in their cards were processed within the Selective Service System pursuant to the delinquency regulations and could take advantage of the regulations' provisions for the removal of the delinquency. Accelerated induction pursuant to the delinquency regulations, however, was found contrary to law by this Court in *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

torn. The Selective Service System administration and the Department of Justice have often explained that the purpose of the regulations and statutory crimes is to secure compliance with Selective Service and military obligations —to put men into the armed forces or civilian public service, not into jails. For this reason the normal policy is to provide a registrant an opportunity to correct any delinquency prior to prosecution. The Selective Service System's own legal treatise says this:

> Selective Service Regulations are designed . . . to prevent, wherever possible, prosecutions for minor infractions of rules during [a registrant's] selective service processing, thereby reducing the number of cases that reach the courts and also giving the registrant, before being prosecuted, an opportunity to report for service in the armed forces. Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. [HERSHEY, LEGAL ASPECTS OF SELECTIVE SERVICE 46-47 (1969).]

The Solicitor General of the United States expressed the official policy in similar terms:

> [Selective Service] regulations are basically remedial rather than punitive in nature. Indeed, the primary purpose of delinquency reclassification is to bring the registrant back into compliance with his duties. [Solicitor General's Brief in *Oestereich* v. *United States*, 393 U.S. 233 (1968), at 8.] [4]

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[4] The Selective Service delinquency regulations provide that "Every registrant who fails [to report for induction when ordered] . . . shall be reported promptly to the United States Attorney on Delinquent Registration Report; provided that if the local board believes by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report for a period not in excess of 20 days." 32 C.F.R. 1642.41(a). The Solicitor General of the United States, in his brief in *Oestereich* v. *Local Board*, *supra*, characterized the

We need not go so far as to argue that the acceptance of petitioner's request and furnishing of new cards condones the alleged offense or otherwise estops the government so as to bar prosecution as a matter of law. We do urge that the exceptional departure in this case from that wise and general policy of allowing registrants to remove their infractions is one of the factors showing that the application of the statute to this petitioner is essentially punishment for the element of public expression in his gesture of opposition to war.

5. This conclusion is fortified by what appears to be a departure from the Selective Service System's own regulations governing prosecution of registrants under the Selective Service law. At the time of petitioner's alleged offense local draft boards were guided in their treatment of Selective Service law violators by Local Board Memorandum No. 85, issued by the National Headquarters of the Selective Service System. That memorandum provided in pertinent part as follows:

> Whenever a local board receives an abandoned or mutilated Registration Certificate or current Notice of Classification which had been issued to one of its own registrants, the following action is recommended:
>
> (a) Declare the registrant to be delinquent for failure to have the card in his possession.
>
> (b) Reclassify the registrant into a class available for service as a delinquent.
>
> (c) At the expiration of the time for taking an appeal, if no appeal has been taken, *and the delinquency has not been removed*, order the registrant to report for induction or for civilian work in lieu of induction if in Class 1-O, as a delinquent, *or in the*

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treatment of law violators by the Selective Service System in this way: "Until the moment of induction, the registrant has the opportunity to have his delinquency status changed if he corrects his default." Brief at 8.

> *board's discretion in a flagrant case, report him to* the United States Attorney for prosecution. [Emphasis added.]

In petitioner's case, even though the delinquency was removed by a request for new cards one day after they were torn, and even though petitioner's case cannot be characterized as "flagrant," he was criminally prosecuted.

6. Petitioner stands sentenced to pay a $10,000 fine and committed to the custody of the Attorney General for five years penal servitude, even though his public gesture of opposition to the war left his Registration Certificate identifiable, legible and useful for all purposes and even though he took immediate steps acceptable to his local Selective Service board to correct any delinquency. The duration of the commitment is subject to modification pending a study under the provisions of 18 U.S.C. § 4208(b) and (c).[4] The $10,000 fine—the maximum permissible and an extraordinarily severe penalty for a 19-year-old youth—appears to be final. The severity of this sentence in relation to the insignificant effect of petitioner's gesture upon a legitimately cognizable governmental interest, even if no further imprisonment is involved, gives additional evidence that the communicative aspects of petitioner's conduct have been the major factor in the case.

In *United States* v. *O'Brien*, *supra*, this Court observed that the "governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System." 391 U.S. at 382. The Court upheld the statute because it "condemns only the independent noncommunicative impact of conduct within its reach." *Id.* Petitioner's conduct had both communicative and noncommunicative as-

---

[4] Absent the possibility of modification after initial imprisonment this sentence would be challenged as cruel and unusual punishment in violation of the Eighth Amendment. *Covey* v. *United States*, 375 U.S. 169 (1963).

poets, but upon these extraordinary facts no one can say with the slightest assurance that the petitioner was prosecuted, convicted and sentenced for "only the independent noncommunicative impact of [his] conduct." Indeed, all evidence is quite to the contrary. The First Amendment requires a reversal of a conviction and sentence "that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects." *Street* v. *New York*, *supra* at 594.

II

Petitioner's tearing of his draft card in two pieces and handing them to a policeman whom he thought to be an FBI Agent did not violate 50 App. U.S.C. § 462(b)(3) as that offense has been defined by this Court in *United States* v. *O'Brien*, *supra*. That case rejected the opinion of the United States Court of Appeals for the First Circuit that the draft card mutilation and destruction act was a superfluity in light of the existing prohibition on non-possession of draft cards. This Court identified a separate governmental interest that was protected by the mutilation and destruction law, that of preventing the unavailability of cards as a result of such destruction or mutilation:

> Whether registrants keep their certificates in their personal possession at all times, as required by the regulations is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them *unavailable* . . . . [391 U.S. at 380-81.]
>
> [L]egislation to insure the continuing *availability* of issued certificates serves a legitimate and substantial purpose in the system's administration . . . . [*Id.* at 377-78.]
>
> For these reasons, the Government has a substantial interest in assuring the continuing *availability* of issued Selective Service certificates . . . . [*Id.* at 381.]

Petitioner tore his Registration Certificate in half and immediately handed the card to a law enforcement officer. Petitioner's certificate was *available* for every purpose, and when put side by side, the two halves of the card are completely readable.[5]

This Court must ensure that statutes—such as the instant one—regulating both conduct and expression are construed in such a manner so as not to allow the suppression of protected expression in the guise of regulation of conduct.

For the foregoing reasons it is respectfully submitted that the petition should be granted.

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[5] Our emphasis on the absence of an offense unless the document is impaired to the point where it will no longer serve its purpose is consistent with the interpretation of the word "mutilation" by state courts. See *e.g. Dinkins* v. *City of Aberdeen*, 42 So.2d 744 (Miss. 1949). "Mutilation ordinarily imports the rendering of a document imperfect by subtracting from it some essential part, as, by cutting, tearing, burning or erasure, but without totally destroying it."

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 19,620

UNITED STATES OF AMERICA, APPELLEE

v.

MICHAEL BENJAMIN WEINMAN, APPELLANT

Appeal from the United States District Court for the Eastern District of Missouri

[September 25, 1970]

Before MEHAFFY, HEANEY and BRIGHT, Circuit Judges

MEHAFFY, Circuit Judge.

Weinman, appellant-defendant, appeals from a judgment of conviction resulting from a jury-waived trial under an indictment charging that he

> ". . . willfully and knowingly did mutilate, destroy and change by tearing asunder his Selective Service registration certificate, Selective Service Form No. 2, which had theretofore been issued to him by Selective Service Board No. 101, Clayton, Missouri.
>
> "In violation of Section 462(b), Title 50 App., United States Code."

We affirm.

On April 30, 1968 [on October 30, 1970, by order of court, the word "April" was changed to "August"] defendant participated in a demonstration in St. Louis in front of the City Hall. He was in the front ranks when it was announced that he had something to say. His version of what he said appears in his testimony as follows:

"Q. Where were you standing at this time? A. Well, there was people speaking were up against Market Street, and there was sort of a semicircle, people back around there towards the City Hall. I was right up near the front of the semicircle.

"Q. What did you do then? A. Just about when they finished speaking, I stepped forward and said something like, 'I am going to declare my independence from the Selective Service System,' tore my cards in half, went over to Detective—the man who I thought was an FBI agent, and gave him the cards."

Defendant by his public act and admissions plainly violated the statute which has been constitutionally upheld by the Supreme Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). It was just such conduct which Congress made a criminal offense by the 1965 Amendment to the Act, 50 App., U.S.C. § 462.

On September 1, 1968 defendant wrote his local board requesting duplicate cards explaining that "I ripped my cards in half and gave them to a plainsclothes policeman . . . ." Upon receiving this information, the local board mailed defendant SSS Form 6, which is a request for duplicate registration certificate or notice of classification. Defendant completed this form, indicating therein that both cards had been "destroyed," and returned it to the local board on September 6, 1968. The local board mailed the duplicate cards to defendant on the same day. On September 30, 1968 the local board received verification of defendant's continued attendance at college. On October 11, 1968 defendant was declared delinquent for "destruction of SSS Form 2 (registration certificate) and SSS Form 110 (notice of classification)" and on October 30, 1968 a notice of delinquency was mailed to defendant.

Defendant was indicted on November 19, 1968 by the grand jury for the United States District Court for the Eastern District of Missouri, Eastern Division. He

waived jury trial, and upon the trial after testimony had been introduced that he publicly tore his cards in two and handed the torn pieces to a police officer, he took the stand and admitted the act. We feel that we would be justified in summarily affirming this case under the teachings of *O'Brien*, *supra*, but defendant in brief has raised a number of issues deserving of comment.

It is first contended that defendant did not knowingly destroy, mutilate or in any manner change his selective service registration certificate so as to constitute a violation of the statute. Defendant attempts to distinguish *O'Brien* and argues that there was in fact no disruption of the smooth functioning of the system here as there was no burning of the cards and the pieces when put in juxtaposition admittedly were completely readable. In our view, this argument is specious. *O'Brien*, *supra*, was a card burning case and the defendant produced the charred remains of the certificate which were photographed. The Chief Justice noted the statute's pertinent parts on page 370 when he quoted from the statute its applicability to anyone who "'forges, alters, *knowingly destroys*, *knowingly mutilates*, or in any manner changes any such certificate. . . .'" Additionally, the Chief Justice commented as follows:

> "By the 1965 Amendment, Congress added to § 12 (b) (3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who 'forges, alters, or in any manner changes' but also one who 'knowingly destroys, [or] knowingly mutilates' a certificate." 391 U.S. at 375.

On page 379 the Chief Justice observed:

> "The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device."

While *O'Brien*, as in this case, only involved the registration card, the Chief Justice observed at page 381:

> "We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.
>
> "It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction."

And finally it was said in *O'Brien* at page 382, "When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest."

It is equally significant that the Supreme Court in *O'Brien* attached an appendix to its opinion, setting out portions of the reports of the Committees on Armed Services of the Senate and House explaining the 1965 Amendment. The following extracts from the reports appear in the appendix at page 387. The Senate report states:

> " 'The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.' "

The House report states:

> "'The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.'"

We do not think any significance can be attached to the fact that defendant here tore his registration card in two rather than burned it. The evidence is plain and uncontradicted that he wilfully mutilated his draft card. The statute does not require that the card be destroyed entirely or rendered unreadable. It proscribes the knowing destruction, mutilation or in any manner changing. As a matter of fact, defendant knowingly destroyed his card as tearing is the ordinary and customary manner of destroying paper items. Defendant himself considered that he destroyed the card as he thought it necessary to procure a new one and gave as reason therefor the destruction of the prior card. While most of the draft card destructions are by burning, we note that the Second Circuit in *United States* v. *Dancis*, 406 F.2d 729 (2nd Cir. 1969), *cert. denied*, 394 U.S. 1019 (1969), upheld a conviction for mutilation of a draft card which was done by tearing the card into pieces.

It is next contended that by requesting a duplicate registration certificate defendant purged himself of the offense and that the action of the board in issuing a duplicate was a condonation of the offense. It is argued that Congress intended to provide a *locus poenitentiae*. Such a doctrine is not applicable here for more than one reason. In the first place, the violation of the statute was a *fait accompli*. Defendant had committed a plain violation of the statute. *Locus poenitentiae*, if applicable at all, is applicable to situations where a violation is an intent and before any substantive crime is ever committed the de-

fendant changes his mind about even intending to commit or participate in the commission of the crime. It is interesting to note that at the time of the commission of the crime and thereafter this defendant had no intention of requesting duplicate cards and only did so because of the grief and misery he had caused his family. In his letter to the draft board requesting a duplicate registration certificate, he stated:

> "With the greatest sadness and confusion that I have ever felt, I request a duplicate registration certificate and notice of classification, in accordance with section 1617.11 of the Selective Service regulations. As was reported on the news media, I ripped my cards in half and gave them to a plain-clothes policeman. *As I stated at that time, I expected the support of my family and had no intention of requesting duplicate cards.* I was shocked to discover that my family was made totally miserable and that they spent the next day weeping and accusing me of hurting them. I don't believe in inflicting that kind of suffering for uncertain and hypothetical results." (Emphasis supplied.)

Defendant has no more right to absolve himself of the crime he has committed than has any other law violator, as for example one guilty of larceny by making restitution. The local draft board, of course, has no authority to condone a criminal offense and, in fact, its issuance of the duplicate certificate does not constitute a condonation of defendant's act since 32 C.F.R. § 1617.11 requires it to issue a duplicate certificate whenever it is notified that the certificate previously issued has been destroyed. Defendant had requested a duplicate on this basis and the board had no option except to issue it.

It is argued that the government's failure to comply with the procedures of Local Board Memorandum 85 before prosecution was a failure of due process under the Fifth Amendment. That memorandum provided that the

delinquency procedures were to be used before prosecution. These delinquency procedures have been declared void in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), and *Breen* v. *Selective Service Board*, 396 U.S. 460 (1970), and consequently the memorandum is void. But even under the regulations, 32 C.F.R. § 1642.8, it is provided that compliance by a local board with the delinquency regulations was not a condition precedent to the prosecution of any person under § 12 of Title 1 of the Military Selective Service Act of 1967 (50 App., U.S.C. § 462).

Next, it is contended that defendant's conviction subsequent to the local board's declaration of his delinquency results in double punishment for the same offense and is in violation of defendant's rights under the Fifth and Sixth Amendments to the Constitution. We have heretofore pointed out that the underlying regulations authorizing induction are invalid. The local board could not have punished defendant under the invalid delinquency provisions, and, therefore, there could be no double jeopardy. The situation is analogous to one where a person is tried twice, the first court having no jurisdiction. In such cases, it has been held that a defendant has not been put in jeopardy twice. *United States* v. *Ball*, 163 U.S. 662, 669 (1896); *Woodring* v. *United States*, 337 F.2d 235 (9th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965); *United States* v. *Sabella*, 272 F.2d 206 (2nd Cir. 1959). These cases effectively answer defendant's double jeopardy argument.

Defendant next argues that the sentence imposed constitutes cruel and unusual punishment in violation of his rights under the Eighth Amendment to the Constitution. This issue has heretofore been ruled on contrary to defendant's argument in *Smith* v. *United States*, 368 F.2d 529 (8th Cir. 1966).

Finally, it is contended that the court erred in overruling defendant's objection to the introduction of his

selective service records into evidence. At the very outset of the trial defendant's counsel asked that defendant's selective service file be placed in evidence, and thereafter during the course of the board clerk's identification of the file and testimony that it was kept in the regular and usual course of business under her care and custody the government sought to have her examine its Exhibit No. 1. Defense counsel objected to the introduction of this exhibit until the entire file was placed into evidence for inspection by defendant. Thereafter, the court attempted to obtain a stipulation that would have shortened the trial, but failing in this gave the defense permission to inquire into the file which was elaborately taken advantage of. The crux of the matter is that the government was merely relying upon Exhibits 2 and 2A which were the two halves of defendant's registration certificate. It also introduced Exhibits 3 and 3A which were the two halves of defendant's notice of classification. Since defendant wanted the entire file introduced and the crucial exhibits were a part of the file, he is in no position to object to their admission. In any event, Exhibits 2 and 2A were necessary to show that the registration certificate was issued by the board and that defendant tore it in two. Hence it is proper evidence and insofar as the exhibits containing the classification notice are concerned it would not in any event, but particularly in a case tried to the court, constitute prejudicial error. See 7 Moore, Federal Practice ¶ 61.07 [3], at 1022 (2nd ed. 1968).

The judgment of conviction is affirmed.

A true copy.

Attest:

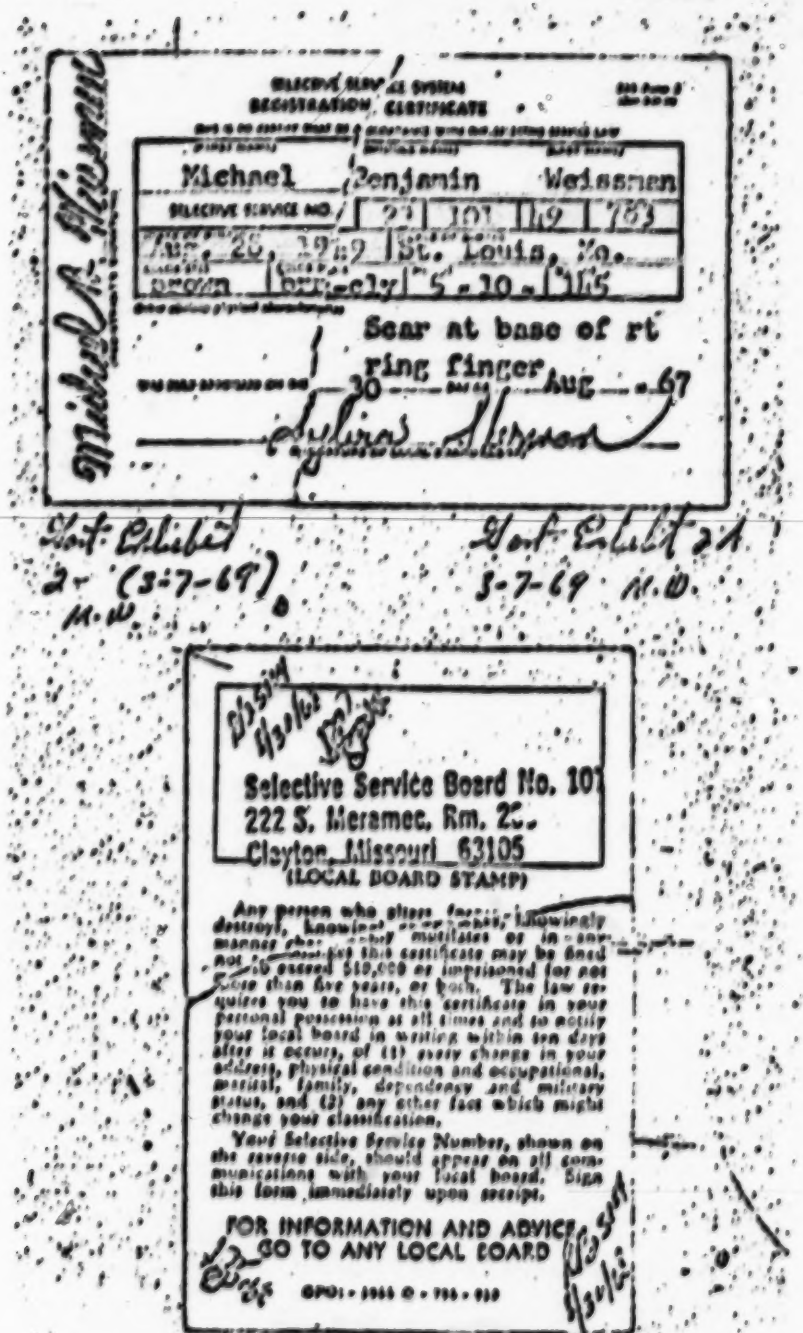
Clerk, U. S. Court of Appeals, Eighth Circuit.

"50 App. U.S.C. § 462. Offenses and penalties"

• • • •

"(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

GOVERNMENT'S EXHIBITS 2 AND 2A.



SELECTIVE SERVICE SYSTEM
REGISTRATION CERTIFICATE

Michael Benjamin Weissman

SELECTIVE SERVICE NO. 21 101 09 783

Mar 20, 1942 St. Louis, Mo.

brown brown 5 - 10 - 145

Scar at base of rt ring finger

30 Aug 67

Michael B. Weissman

Selective Service Board No. 101
222 S. Meramec, Rm. 2..
Clayton, Missouri 63105
(LOCAL BOARD STAMP)

Any person who alters, forges, knowingly destroys, knowingly ... mutilates or in any manner changes this certificate may be fined not ... exceed $10,000 or imprisoned for not more than five years, or both. The law requires you to have this certificate in your personal possession at all times and to notify your local board in writing within ten days after it occurs, of (1) every change in your address, physical condition and occupational, marital, family, dependency and military status, and (2) any other fact which might change your classification.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon receipt.

FOR INFORMATION AND ADVICE GO TO ANY LOCAL BOARD

GPO1 • 1966 O - 796 - 919

Gov't Exhibit 2 (3-7-69) M.W.

Gov't Exhibit 2A 3-7-69 M.W.

Book of Exhibit 2 & 2A.

GOVERNMENT'S EXHIBITS 3 AND 3A.

Govt Ex 3-
3-2-67

SELECTIVE SERVICE SYSTEM

NOTICE OF CLASSIFICATION

This is to certify that

Michael B. Weissman

(First name) (Middle name) (Last name)

Selective Service No.

23	201	49	783

is classified in Class 2-S

until OCT 1 1968

by Local Board which has its office at the address shown below:

☐ by Appeal Board vote of ____ to ____

☐ by President

OCT 24 1967

(Date of mailing)

Michael B. Weissman

(Registrant's signature)

SSS Form 110 (Rev. 6-15-67)
(Previous editions are obsolete)
(Approval not required)

2-7-67

The law requires you to have this Notice in addition to your Registration Certificate, in your personal possession at all times and to surrender it upon entering active duty in the Armed Forces.

The law requires you to notify your local board in writing within 10 days after it occurs, (1) of every change in your address, physical condition, and occupational (including student), marital, family, dependency and military status, and (2) of any other fact which might change your classification.

Any person who wilfully knowingly destroys, knowingly mutilates or in any manner changes this certificate or who, for the purpose of false classification or representation, has in his possession a certificate of another or who delivers his certificate to another to be used for such purpose, may be fined not to exceed $10,000 or imprisoned for not more than 5 years, or both.

Selective Service Board No. 103
222 S. Meramec, Rm. 208
Clayton, Missouri 63105

(LOCAL BOARD STAMP)

SEE OTHER SIDE

Govt Ex 3A
Pltf 5104
5/24/68

NOTICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL

If this classification is by a local board, you may, within 10 days after the mailing of this notice, file a written request for a personal appearance before the local board (unless this classification has been determined upon such personal appearance). Following such personal appearance you may file a written notice of appeal from the local board's classification within the applicable period mentioned in the next paragraph after the date of mailing of the new notice of classification. If you do not wish a personal appearance but do want to appeal your case, you may do so by filing such an appeal in writing, to your local board, within the specified time.

An appeal from this classification by the local board may be taken by filing a written notice of appeal with your local board within one of the following periods after the date of mailing of this notice:

(1) 30 days if the registrant is located in the United States, its territories, possessions, Canada, Cuba, or Mexico; or,

(2) 60 days if the registrant is located in a foreign country other than Canada, Cuba, or Mexico.

You may file with your local board a written request that the appeal be submitted to the appeal board having jurisdiction over the area in which your principal place of employment or current place of residence is located.

If an appeal has been taken, and one or more members of the appeal board dissented from such classification, you may file a written notice of appeal to the President with your local board within 30 DAYS after the mailing of this notice.

Your Government Appeal Agent, attached to your selective service local board, is available to advise you regarding your rights and liabilities under the selective service law.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon receipt.

FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD

Govt Ex 3A
Pltf 5104
5/24/68

Back of Exhibit 3 + 3A.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1147

MICHAEL BENJAMIN WEISSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Missouri of wilfully tearing his draft registration certificate into two pieces in violation of Section 462(b)(3) of the Universal Military Training and Service Act (50 U.S.C. App. 462(b)(3)). He was sentenced under 18 U.S.C. 4208(b), which provides for tentative imposition of the maximum sentence (five years and a fine of $10,000 in this case) pending receipt of the study and report authorized by that statute, after which the sentence is finally determined. As permitted by the decision in *Corey* v. *United States*, 375 U.S. 169, petitioner appealed his conviction before the final determination of sentence.

413-990—71

The court of appeals affirmed the conviction (Pet. App. A).

The legal issues raised in the petition are fully answered by the opinion of the court below. The essence of the petition is, we believe, an appeal to this Court to supersede the prosecutive judgment to seek an indictment, relief that is plainly not available here.

Petitioner argues that the destruction of his draft card did not interfere significantly with the Selective Service process, particularly since he sought a new card shortly after it was destroyed. To be sure, no single draft card in isolation is essential to the operation of the Selective Service system, but, as the Second Circuit said in *United States* v. *Miller*, 367 F. 2d 72, 81, certiorari denied, 386 U.S. 911, "proper functioning of the system depends upon the aggregated consequences of individual acts." This Court in *United States* v. *O'Brien*, 391 U.S. 367, 381, rested its decision on the ground that the continuing availability to registrants of their Selective Service certificates is important to the smooth and proper functioning of the Selective Service system. When petitioner tore his card in half and handed it to the plainclothesman, he was deliberately making it unavailable for the intended purpose protected by the statute—as his subsequent letter seeking a replacement attested (see Pet. App. A–6)—and it was only the plainclothesman's action that preserved it. Even his subsequent decision to ask for a replacement did not cure the inconsistency of his act with the needs of

the system; if numerous registrants did so, the administrative burden would be substantial.

Although the prosecutor's decision in this case is plainly not under review here, the time when it was exercised and the circumstances of petitioner's act are pertinent factors in any consideration of that decision. The publicity given to petitioner's act—not his views—was reasonably thought to create a risk of widespread imitation. Moreover, petitioner's request for a duplicate card gave no evidence of contrition.

The case involves no legal question appropriate for review by this Court. Further proceedings with respect to sentence remain open in the district court.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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*Upon receipt of the study provided for in 18 U.S.C. 4208(b)—after a three-month commitment for that purpose, subject to a three-month extension if necessary—the district court will consider the sentence further, and may (under section 4208(b), or under Rule 35, F.R. Crim. P.) reduce both the 5-year term and the $10,000 fine tentatively imposed.

U.S. GOVERNMENT PRINTING OFFICE: 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1147

MICHAEL BENJAMIN WEISSMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY

The Government's opposition to certiorari rests upon two misconceptions.

(1) Petitioner submits that he did not mutilate the draft card within the meaning of the statute [Pet. pp. 12-13] or render it "unavailable" for its intended purpose under *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Solicitor-General replies [Memorandum, p. 2] "when Petitioner tore his card in half and handed it to the plainclothesman, he was deliberately making it unavailable . . . ." To draw in the handing to the plainclothesman as part of the supposed offense is misleading because it confuses "unavailability" in the *O'Brien* sense—which means destroyed or mutilated to the point of unavailability—with "unavailability" in the sense of unavailable for use by the Registrant because of nonpossession, which this Court has said is not punishable under 50 App. U.S.C. § 462(b)(3). See 391 U.S. at 380-381. Thus, the Gov-

ernment's memorandum fails to meet this showing that Petitioner's tearing the card did not mutilate or destroy it within the meaning of the statute [Pet. 4, 7, 12-13].*

(2) Petitioner submits that the record in this case taken as a whole demonstrates that the prosecution, conviction and sentence are essentially punishment for the element of public expression in his gesture of opposition to war—not for the "non-communicative impact of his conduct and for nothing else . . ." as required by *O'Brien*, 391 U.S. at 382. In the Court of Appeals the Department of Justice admitted during oral argument that Petitioner would not have been prosecuted if he had torn his draft card in the privacy of his home. The Solicitor-General makes essentially the same admission in this Court:

> . . . the circumstances of Petitioner's act are pertinent factors in any consideration of that decision [to commence prosecution]. The publicity given to Petitioner's act—not his views—was reasonably thought to create a risk of widespread imitation. [Memorandum, p. 3.]

Plainly then, the Petitioner would not have been prosecuted for any injury this tearing of the card was thought to have on the operation of the Selective Service System. Taking into account the publicity attendant upon his acting *in public at a peace rally* in a decision to prosecute necessarily means singling the accused out for punishment for publicly expressing ideas concerning war and conscription. *O'Brien* teaches that for the purposes of punishment one can separate the harm done by the act of mutilation from the concomitant expression of opinion. One cannot, consistently with the First Amendment, go

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* The subsequent act of giving the card to a detective whom Petitioner believed to be an FBI agent is important only because it insured that the two halves would remain as available for all the card's intended uses as if he had handed an undamaged card to the detective.

further and appropriately separate the public nature of action from its significance as a mode of expression. To punish a young man because he tore his draft card *in public* is to punish him for the message conveyed to the public—not for the "noncommunicative impact of his conduct *and for nothing else* . . . ." 391 U.S. at 382. (Emphasis supplied.)

The application of 50 App. U.S.C. § 462(b)(3) in the present case goes far beyond what was decided in *O'Brien*, and raises a substantial First Amendment question which has not been and should be decided by this Court.

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